



FRITZ, BYRNE, HEAD & HARRISON, PLLC

Attorneys at Law

December 22, 2010

VIA FACSIMILE NO. 239-3311

- and -

U. S. FIRST CLASS MAIL

Ms. LaDonna Castañuela, Chief Clerk
Office of the Chief Clerk (MC-105)
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2010 DEC 23 AM 10:09
CHIEF CLERKS OFFICE

Re: In the Matter of the Application of Micro Dirt, Inc. d/b/a Texas Organic
Recovery for a Grease Trap Registration No. 43024

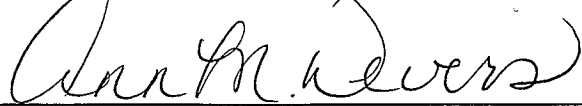
Dear Ms. Castañuela:

Enclosed are an original and eight (8) copies of a Motion to Overturn Regarding Issuance of Grease Trap Waste Processing Registration No. 43024 to Micro Dirt, Inc. d/b/a Texas Organic Recovery which we respectfully request be filed among the other papers in the above-referenced proceeding. Please return a file-stamped copy to me in the self-addressed, postage prepaid envelope provided for your convenience.

A copy of the Motion is being forwarded to all parties of interest as set forth below. Thank you for your assistance in this matter.

Very truly yours,

FRITZ, BYRNE, HEAD & HARRISON, PLLC

By: 

Ann M. Devers

Assistant to J. D. Head

JDH/amd

Enclosures

cc: See, Certificate of Service

Value Driven...Client Oriented



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IN THE MATTER OF THE
APPLICATION OF MICRO DIRT,
INC. d/b/a TEXAS ORGANIC
RECOVERY FOR A GREASE TRAP
REGISTRATION NO. 43024

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BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY
FEB 22 AM 10:09
CHIEF CLERK'S OFFICE

**MOTION TO OVERTURN REGARDING ISSUANCE
OF GREASE TRAP WASTE PROCESSING REGISTRATION
NO. 43024 TO MICRO DIRT, INC. d/b/a TEXAS ORGANIC RECOVERY**

TO THE HONORABLE TCEQ COMMISSIONERS:

COMES NOW, Thomson Family Limited Partnership, H. Philip Whitworth, Jr., Ann Messer, and Julie Moore ("Movants") and pursuant to 30 T.A.C. § 50.139 files this Motion to Overturn the Executive Director's November 22, 2010 decision to issue Registration No. 43024 to Micro Dirt, Inc. d/b/a Texas Organic Recovery ("Micro Dirt") and in support thereof respectfully show the following.

I. Introduction

Movants are persons owning land within one (1) mile of the Micro Dirt facility. Movants were all named parties in the prior contested case hearing related to proposed Permit No. MSW-2320 applied for by Roy Eugene Donaldson, II, sole director of Micro Dirt, wherein this Commission denied a permit to compost grease trap waste. The basis of the permit denial by this Commission was Roy Eugene Donaldson, II's failure to meet his burden of proof that the facility at 15500 Goforth Road in Travis County, Texas was constructed to protect groundwater.

The Executive Director's November 22, 2010 decision to issue a MSW registration to Micro Dirt includes errors of fact and law. The Executive Director erred by issuing the grease trap waste registration to a facility with inadequate financial assurance, a defective liner to protect groundwater, inadequate fire protection, and a history of disregarding TCEQ regulations related to acceptance of

waste. In addition, the conditions of Registration No. 43024 include no protections to ensure the grease trap waste effluent meets environmental criteria for composting. Not only should the Commission overturn the Executive Director's issuance of MSW Registration No. 42024, the Commission should also revoke Registration No. 42016 authorizing composting of certain materials for Micro Dirt's operations without required financial assurance.

II. Factual and Procedural Background

1. This Motion to Overturn arises out of the Executive Director's (used interchangeably herein with TCEQ) decision regarding Micro Dirt's application for Municipal Solid Waste Registration No. 43024 seeking authorization to construct and operate a facility to store, transfer, process and recover or recycle material from grease trap waste at a facility located in Travis County, Texas at 15500 Goforth Road, Creedmoor, Texas.

2. Micro Dirt originally submitted its registration application on or about August 7, 2009. The application was subsequently revised January 12, 2010 and April 13, 2010 in response to notices of deficiencies from the TCEQ.

3. A public meeting was held in Creedmoor, Texas on September 2, 2010 to receive comments on the application of Micro Dirt for Type V Grease Trap Registration No. 43024.

4. By letter dated December 2, 2010, the TCEQ notified Micro Dirt of approval of its registration application. The effective date of Registration No. 43024 was November 22, 2010.

5. On December 4, 1998, Roy Eugene Donaldson, II, the sole director of Micro Dirt was issued Registration No. 42016 for a biosolids compost facility by the TCEQ. This registration authorized Texas Organic Recovery a/k/a Micro Dirt to store, process and market materials in accordance with the limitations, requirements, and other conditions set forth therein. Waste

authorized to be accepted included municipal sewer sludge, septage, grease trap waste, paper, vegetative waste matter, brush, wood and yard waste. The facility was required by regulations existing at the time and the Site Development Plan to have a liner (to protect groundwater) approved by the TCEQ. Micro Dirt proceeded to compost grease trap waste under Registration No. 42016.

6. Due to a change in Texas law requiring the composting of grease trap waste to be authorized by a permit - not a registration, in January 2004, Roy Eugene Donaldson, II applied to the TCEQ for Permit No. 2320 to authorize the continued operation of the existing Type V-RC municipal solid waste composting facility called the Texas Organic Recovery Compost Facility at 15500 Goforth Road in Travis County, Texas.

7. The Movants in this action were all named parties opposing proposed Permit No. MSW-2320 in a contested case hearing. After a contested case hearing, and on the recommendation of a judge with the State Office of Administrative Hearings, the Commissioners denied the permit application of Roy Eugene Donaldson, II because he failed to meet his burden of proof to show that operation of the facility under the terms of MSW Permit No. 2320 would prevent contamination of groundwater under the facility. Certain soil borings did not pass the TCEQ sieve test for a liner protective of groundwater. The Commission found in its May 23, 2008 Order that there was insufficient evidence that the in situ clay liner extends through the processing, windrow and mixing areas and there was no evidence that Roy Eugene Donaldson, II adopted a soils liner control plan approved by the Executive Director of the TCEQ and submitted this data to the Executive Director in a soil and liner evaluation report. Finally, the Commissioners found that there was insufficient evidence that the in situ clay liner underlying the processing, windrow or mixing areas would protect groundwater.

8. In the application materials submitted for Registration No. 43024, the subject of this lawsuit, the application states “the facility has an existing liner approved under its 1998 registration.” In the hearing on proposed Permit No. MSW-2320, Micro Dirt’s expert witness, Mr. Robert Thonhoff, the individual who sealed the application for Registration No. 43024, could produce no evidence whatsoever that there was an in situ liner approved by the TCEQ. Micro Dirt’s representative at the hearing, Mr. Van Sickel, testified that despite admissions and responses to interrogatories of which he sponsored, he had no personal knowledge of a liner constructed at the facility in accordance with the TCEQ Liner Handbook. The TCEQ has no record of approving any liner for the facility. Micro Dirt’s statement in the current application that the facility has an existing liner approved under its 1998 registration is a false or misleading statement which warrants registration denial pursuant to 30 T.A.C. § 305.66(f)(3).

9. Although Micro Dirt’s witness at the contested hearing testified that the “approved liner” was at the surface, however, in the application for Registration No. 43024, the Applicant admits groundwater may be found within the top 9 to 10 surface feet. The application states that the site has about 9 feet of gravelly clays over about 30 feet of an in situ natural clay liner. This statement is wildly inconsistent with previous sworn testimony that the liner is at the surface. Once again, the Applicant has made a false or misleading statement which warrants registration denial pursuant to 30 T.A.C. § 305.66(f)(3).

10. Despite the May 23, 2008 denial of its permit authorizing the composting of grease trap waste, Micro Dirt was cited by the TCEQ in August 2008 for the illegal receipt of 123 loads of grease trap waste between July 15, 2008 and August 8, 2008. There is currently pending TCEQ

enforcement action for over \$140,000 in administrative penalties against Micro Dirt for the illegal acceptance of grease trap waste after denial of proposed Permit No. MSW-2320.

11. Despite the August 2008 citation for illegal receipt of grease trap waste, a TCEQ August 8, 2008 letter stating continued acceptance of grease trap waste was unauthorized, and a TCEQ January 9, 2009 letter expressly informing Micro Dirt that it could not receive grease trap waste for composting, public documents reveal that Micro Dirt received grease trap waste November 9, 2009 from the Round Rock Independent School District and also received grit trap waste from Travis County Municipal Utility District No. 4 on November 15, 2009. Micro Dirt is not authorized to accept grit or grease trap waste for composting.

12. Pursuant to 30 T.A.C. § 332.34(15) and 30 T.A.C. § 328.5(c) - (e), Micro Dirt is required to maintain financial assurance for its facility inasmuch as its stockpiles combustibles such as brush, wood and yard waste. However, Micro Dirt has not posted financial assurance for the combustible materials stockpiled on site pursuant to Registration No. 42016. This has been required since 2004.

13. Registration No. 43024 only requires financial assurance in the amount of \$10,000, which does not encompass the combustible materials on site, and which is insufficient for the closure purposes described in the registration application. In effect, the TCEQ in Registration No. 43024 is improperly authorizing Micro Dirt to compost at a facility without proper financial assurance.

14. 30 T.A.C. § 330.459, relating to closure requirements for municipal solid waste storage and processing units, requires that the owner or operator shall evacuate all material on-site (feed stock, in process, and processed) to an authorized facility and disinfect all leachate handling units, tipping areas, processing areas, and post-processing areas. Moreover, § 330.459(d) provides

that a recycling facility that stores combustible materials outdoors must comply with the following closure requirements:

- a. Closure must include collecting processed and unprocessed materials, and transporting the materials to an authorized facility for disposition.

Micro Dirt is by definition a recycling facility inasmuch as it composts. 30 T.A.C. § 330.3(123).

15. Pursuant to 30 T.A.C. § 330.505, an owner or operator of a recycling facility that stores combustible materials outdoors shall provide a written cost estimate, in current dollars, showing the cost of hiring a third party to close the process facility by disposition of all processed and unprocessed materials.

16. Micro Dirt has not in Registration No. 43024 or existing Registration No. 42016 provided cost estimates pursuant to 30 T.A.C. § 330.505 or provided financial assurance for closure with respect to combustible materials of all waste and processed and unprocessed combustible materials stored outdoors.

17. Registration No. 43024 would authorize Micro Dirt to utilize effluent from grease trap waste processing on the compost, despite the fact that there is not an approved liner under the compost facility and the TCEQ has already determined that Micro Dirt failed to meet its burden that the facility was protective of groundwater.

18. Registration No. 43024 would authorize the use of grease trap effluent to be composted at the facility despite the fact that there is no testing requirement to ensure the effluent is appropriate for composting purposes, particularly in the absence of an approved liner. This is contrary to the TCEQ's written admonition to Micro Dirt that, with respect to grease trap waste, any authorization issued would set specifications for processed material to meet before it could be composted under a registration.

V. Errors of the Executive Director

19. The TCEQ is barred by the Doctrine of *Res Judicata* to issued Registration No. 43024 allowing Micro Dirt to compost the grease trap waste effluent at this facility. The Commission previously ruled the liner was insufficient to protect groundwater and nothing in the registration application changes this.

20. The application submitted by Micro Dirt contains a false and misleading statement with respect to the presence of a liner approved by the TCEQ in 1998. This false or misleading statement warrants registration denial by the TCEQ pursuant to 30 T.A.C. § 305.66(f)(3).

21. The TCEQ's failure to require financial assurance for processed and unprocessed combustible material where grease trap waste effluent would be applied at the Micro Dirt facility is in violation of TCEQ rules at 30 T.A.C. § 332.34(15), 30 T.A.C. § 328.5(c) - (e), and 30 T.A.C. § 330.505.

22. The TCEQ acted arbitrarily and capriciously in issuing Registration No. 43024 when there is a pending enforcement action against Micro Dirt for over \$140,000 in administrative penalties for the illegal acceptance of grease trap waste in 2008 after denial of proposed Permit No. MSW-2320. The TCEQ improperly failed to take into account Micro Dirt's compliance history in making a determination on the Registration application. This is exacerbated by the fact Micro Dirt continued to illegally accept grease trap waste in 2009.

23. The TCEQ acted arbitrarily and capriciously in issuing Registration No. 43024 allowing utilization of grease trap waste effluent in the composting operations where the TCEQ has already determined the facility does not have a liner that is protective of groundwater.

24. The TCEQ's action in issuing Registration No. 43024 was improper in that the Registration includes no water quality parameters for the grease trap waste effluent to be disposed of on compost at the Micro Dirt facility. The TCEQ has previously informed Micro Dirt that any authorization issued would set specifications for processed material to meet before it could be composted under a registration.

25. The TCEQ erred in approving the Fire Protection Plan in the application inasmuch as there was no evidence of an adequate supply of water under pressure for firefighting in the retention pond in violation of 30 T.A.C. § 330.221.

26. The TCEQ erred in approving Registration No. 43024 because there are insufficient engineering controls to contain a worst case spill in violation of 30 T.A.C. § 330.63(d)(1)(B) and 30 T.A.C. § 330.227.

27. The TCEQ erred in approving Registration No. 43024 because the \$10,000 in financial assurance for items covered in the application is woefully insufficient.

28. The TCEQ erred in determining that Micro Dirt complied with all regulatory requirements for Type V liquid processing facilities.

29. The TCEQ's decision approving Micro Dirt's application and issuing it a registration violated Chapter 361 of the Texas Health and Safety Code and its own applicable rules.

30. Because Micro Dirt failed to comply with all applicable requirements, the TCEQ's decision to approve its Registration application was made through unlawful procedure, was arbitrary and capricious, and characterized by an abuse of discretion.

III. Conclusion

Movants respectfully request, based on the foregoing, that the Commission overturn the Executive Director's decision to issue Registration No. 43024 to Micro Dirt. The Commission should revoke Registration No. 42016 for Micro Dirt's failure to post financial assurance since 2004.

Respectfully submitted,

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By: _____

J. D. Head

State Bar No. 09322400

ATTORNEYS FOR MOVANTS

CERTIFICATE OF SERVICE

By my signature above, I hereby certify that a true and correct copy of the foregoing document was served on this 22nd day of December, 2010, via U.S. First Class mail to the following:

Mr. Roy Eugene Donaldson, II, Director
Micro Dirt, Inc. d/b/a Texas Organic Recovery
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